UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

C.A. 03-148L	Tammy Passa, et al. v. Jeffrey Derderian, et al.
C.A. 03-208L	Ronald Kingsley, et al. v. Jeffrey Derderian, et al.
C.A. 03-335L	George Guidon, et al. v. Jeffrey Derderian, et al.
C.A. 03-483L	Chad Henault, et al. v. Jeffrey Derderian, et al.
C.A. 04-26L	Linda Roderigues, et al. v. Jeffrey Derderian, et al.
C.A. 04-56L	Charles Sweet, et al. v. Jeffrey Derderian, et al.
C.A. 04-312L	Albert Gray, et al. v. Jeffrey Derderian, et al.
C.A. 05-002L	Andrew Paskowski, et al. v. Jeffrey Derderian, et al.

OBJECTION OF THE PLAINTIFFS IN GRAY, ET AL. (C.A. NO. 04-312L) TO THE MOTION TO DISMISS FILED BY DENIS LAROCQUE, ANTHONY BETTENCOURT AND MALCOLM MOORE IN HIS CAPACITY AS FINANCE DIRECTOR OF THE TOWN OF WEST WARWICK

Plaintiffs hereby object to Defendants Denis Larocque, Anthony Bettencourt and Malcolm Moore in his capacity as Finance Director for the Town of West Warwick's Motion to Dismiss as set forth in the Memorandum of Law in Support of this Objection.

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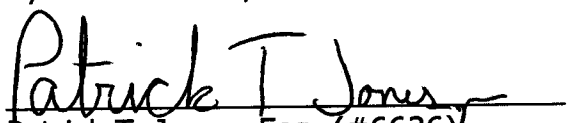

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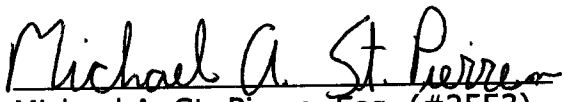

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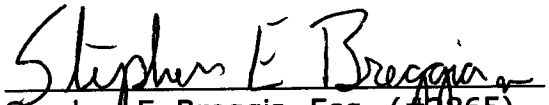

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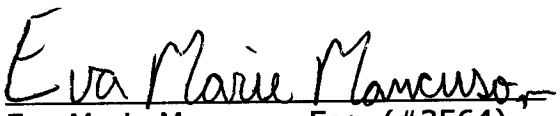

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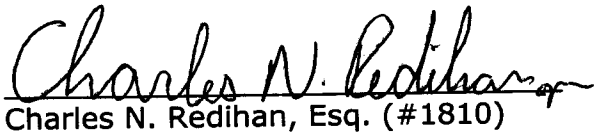

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF RHODE ISLAND

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MEMORANDUM OF THE PLAINTIFFS IN *GRAY, ET AL.* (C.A. NO. 04-312L) IN SUPPORT OF THEIR OBJECTION TO THE MOTION TO DISMISS FILED BY DENIS LAROCQUE, ANTHONY BETTENCOURT AND MALCOLM MOORE IN HIS CAPACITY AS FINANCE DIRECTOR OF THE TOWN OF WEST WARWICK

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TABLE OF CONTENTS

PAGE

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I. Introduction

This memorandum is in support of Plaintiffs' objections to the Motion to Dismiss filed by Denis Larocque, Anthony Bettencourt and Malcolm Moore in his capacity as Finance Director for the Town of West Warwick ("Municipal Defendants").

The counts of the First Amended Master Complaint (hereinafter "FAMC") directed against these defendants are XXXI-XXXIV.

Plaintiffs have alleged as against the Municipal Defendants that,

> 415. Denis Larocque, Fire Inspector, negligently failed to properly inspect the premises at 211 Cowesett Avenue in West Warwick, Rhode Island at various times prior to February 20, 2003; additionally, said inspections were relied upon by the owners of The Station and of the realty.
>
> * * *
>
> 417. On February 20, 2003, Anthony Bettencourt was employed as a special detail officer to provide security services, and enforce the law, at The Station nightclub before and during the Great White Concert.
>
> 418. Defendant Anthony Bettencourt negligently failed to use reasonable care in carrying out his duties, failed to monitor and enforce occupancy restrictions, and permitted dangerous and unlawful overcrowding of the premises, failed to enforce Rhode Island's laws for the permit and use of pyrotechnics and otherwise negligently failed to perform his functions intended to protect the patrons of The Station, including plaintiffs.
>
> * * *

420. The negligence of the town of West Warwick, by and through its agents, servants and employees, included without limitation:

a. failing to adequately inspect The Station for safety hazards and violations;

b. failing to enforce fire safety laws, regulations and standards;

c. allowing unsafe numbers of persons on the premises during the performance;

d. allowing the use of dangerous pyrotechnic devices during performances at The Station;

e. allowing a public nuisance and a fire hazard to exist for an unreasonable period of time, namely, The Station nightclub;

f. failing to provide sufficient security and fire protection for a function at which they knew or should have known large number of people would be in attendance;

g. knowing of numerous dangerous conditions and fire hazards at The Station and failing to remedy those conditions or ordering them to be remedied;

h. failing to protect members of the public for the foreseeable risk of serious injury or death at The Station;

i. failing to adequately oversee, supervise, monitor, evaluate, train and/or retrain those performing inspections at The Station;

j. through the actions and inactions of its "detail policeman" Anthony Bettencourt who was performing a non-governmental function typically performed by private security services on the night of the fire, allowing (a) through (i) above; and

k. responsibility for other acts and failures to act that may become apparent after discovery.

* * *

425. The egregious negligence of the Town of West Warwick through Denis Larocque, and/or Anthony Bettencourt and/or Stephen D. Murray (or other agents, servants or employees) was a proximate cause of plaintiffs' deaths and injuries.

(FAMC pp. 94-95).

In addition, Plaintiffs allege that the actions of Larocque constituted a "lack of good faith performance of his duties." (FAMC p. 95, ¶421).

Plaintiffs' response to the Municipal Defendants' Motion to Dismiss will track the issues raised by those Defendants in the sequence contained in their Memorandum in support of their motion.

II. Background

While the intense publicity surrounding the fire at The Station nightclub has engendered the apparent belief that many of the facts surrounding that fire have been determined, in fact, they have not. Thus, unsupported comments by the Municipal Defendants, such as "pyrotechnics were ignited from three (3) 'cones' set on the stage" (Municipal Defendants' Memo., p. 2) are not "facts" in this case - at least not yet. The sole "facts" to be evaluated for the purposes of this motion are those asserted by Plaintiffs in the counts against these Defendants.

III. Standard of Review

It is fundamental that the Municipal Defendants' motion must be denied unless it is "clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 507, 122 S.Ct. 992, 995 (2002) (quoting Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232 (1984)). This principle is so strong that "[t]he Complaint should not be dismissed merely because Plaintiffs' allegations do not support the legal theory [they] intend to proceed on, since the court is under a duty to examine the Complaint to determine if the allegations provide for relief on any possible theory." 5A Wright & Miller, Federal Practice and Procedure: Civil 2d

§ 1357. (emphasis added). "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." Swierkiewicz, supra at 515, 999 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974)).

IV. Argument

A. Plaintiffs' Complaint States A Cause Of Action Against The Municipal Defendants

The Municipal Defendants argue that there is no liability for a governmental entity's "negligent enforcement of regulatory schemes." Municipal Defendants' Memo., p. 5.

First, Plaintiffs' FAMC alleges much more than this. By way of example, ¶420(c) alleges negligence by allowing "unsafe numbers of persons on the premises during the performance; ¶420(e) alleges negligence in "allowing a public nuisance and a fire hazard to exist for an unreasonable period of time."

Second, it is the law in Rhode Island that negligent inspections of buildings may, under certain circumstances, give rise to liability to those injured as a result of such negligence.

It is clear that Rhode Island, by enacting R.I. Gen. Laws § 9-31-1, has explicitly waived the tort immunity of its municipalities:[1]

> The state of Rhode Island and any political subdivision thereof, including all cities and towns, shall, subject to the period of limitations set forth in § 9-1-25, hereby be liable in all actions of tort in the same manner as a private individual or corporation . . .

[1] Indeed, it is more accurate to say that the Rhode Island legislature waived the State's immunity by this statute. The Rhode Island Supreme Court had earlier abolished that of Rhode Island municipalities in Becker v. Beaudoin, 261 A.2d 896 (R.I. 1970). The legislature imposed certain monetary limitations on municipal liability for governmental functions by enacting § 9-31-1 after Becker v. Beaudoin.

(emphasis added). The Rhode Island Supreme Court has ruled on several occasions that the enactment of R.I. Gen. Laws § 9-31-1 constitutes a "blanket waiver" of immunity in tort actions such as the case at bar. For instance, in Gagnon v. State, 578 A.2d 656, 658 (R.I. 1990), the Rhode Island Supreme Court ruled that the State incorrectly perceived the effect of R.I. Gen. Laws § 9-31-1:

> In its brief the state incorrectly perceives its potential liability of § 9-31-1 as minimal. Quite to the contrary, however, this court had stated that although there are limits to its liability, the state has made a "blanket waiver" of its sovereign immunity by enacting § 9-31-1.

Gagnon, 578 A.2d at 658 (emphasis added) (citing, Laird v. Chrysler Corp., 460 A.2d 425, 429 (R.I. 1983); O'Brien v. State, 555 A.2d 334, 336 (R.I. 1989)).

Admittedly, notwithstanding this blanket waiver, there are circumstances where the judicially enunciated "public duty doctrine" may bar recovery. By the same token, there are judicially created exceptions to this doctrine that remove the bar and allow recovery.

Defendants cite cases from other jurisdictions which, they urge, would bar recovery in those jurisdictions, under the facts of this case. However, Plaintiffs also can cite to cases in other jurisdictions where recovery would be allowed in those jurisdictions under the facts of this case. (See, Daggett v. County of Mariposa, 770 P.2d 384 (Ariz. 1989); Brennan v. City of Eugene, 591 P.2d 719 (Ore. 1979); Coffey v. The City of Milwaukee, 247 N.W.2d 132 (Wis. 1976); State of Alaska v. Abbott, 498 P.2d 712 (Ala. 1972)). Whether the actions brought herein against the Municipal Defendants would be barred under Kentucky law or allowed under that of Wisconsin is not of any significance. The only meaningful issue is whether or not they are maintainable under Rhode Island law.

When it is alleged that a municipality is negligent in the performance of a governmental function, a municipality will be liable if: (1) it has acted egregiously; **or** (2) if the plaintiff is owed a special duty. The Rhode Island Supreme Court has ruled that the egregious conduct exception to the public duty doctrine does not require Plaintiffs to be specifically identifiable individuals for liability to extend to the municipality:

> We have also held in certain instances that the negligence of the State or its political subdivisions is so extreme that the plaintiff need not prove that he or she was a specific, identifiable, and a foreseeable victim or a member of a group of such victims in order to recover.

Haley v. Town, 611 A.2d 845, 849 (R.I. 1992). (emphasis added).

In Haworth v. Lannon, 813 A.2d 62 (R.I. 2003), the Rhode Island Supreme Court ruled, "If either exception were applicable [egregious conduct or special duty], the Town would be liable for the tortious acts of its agent ." 813 A.2d at 64.

What is necessary to establish "egregious"? The Municipal Defendants will not be afforded protection under the public duty doctrine if they had knowledge that they created a circumstance that forced an individual into a position of peril and subsequently chose not to remedy the situation. Verity v. Danti, 585 A.2d 65 (R.I. 1991). It is clear that, under the egregious test, the municipalities' knowledge can be actual or constructive. Bierman v. Shookster, 590 A.2d 402, 404 (R.I. 1991). Plaintiffs have alleged that all Municipal Defendants were negligent in an egregious manner.

As discovery proceeds, the circumstances of this case may prove yet more egregious than other cases in which liability has been upheld by the Rhode Island Supreme Court. In Verity, the State was aware of a tree which had existed for

more than one hundred years and ultimately obstructed an entire sidewalk. Verity, 585 A.2d at 67. A pedestrian approached the obstruction, and was hit by an automobile when she stepped into the road to pass the tree. 585 A.2d at 65-66. In Martinelli v. Hopkins, 787 A.2d 1158, 1168-1169 (R.I. 2001), a trial justice found that the Town of Burrillville failed to inspect a licensed premises, permitted an entertainer to assemble an indefinite crowd size, and had abundant notice that a festival was an extraordinary event. In Martinelli, the plaintiff was injured because a rotted tree fell on him when people attempted to urinate in the woods by traversing a snow fence that was attached to the rotted tree. 787 A.2d at 1163. Finally, in Bierman v. Shookster, 590 A.2d 402, 404 (R.I. 1991), an automobile accident occurred in Providence as a result of a malfunctioning traffic signal. The court ruled, "By failing to correct the malfunction, of which it should have been aware, the city jeopardized the safety of those utilizing the intersection in reliance on the traffic lights." 590 A.2d at 404. (emphasis added). The actions and omissions of the Municipal Defendants are comparable (or may prove to be comparable) to the acts and omissions in Verity, Martinelli and Bierman, where egregious conduct was found to exist.

Finally, it is clear that the "creation" of a circumstance can occur by omission. For instance, in Verity, the State failed to remove a tree. In Bierman, the City of Providence failed to repair a malfunctioning traffic light. In Martinelli, the Town of Burrillville licensed an event without inspecting the premises and "clos[ed] its eyes to risks and hazards that attendees would encounter."

In a real sense, the foregoing analysis is probably, at this stage at least, academic. This is because, for the moment, the burden is on the Municipal

Defendants to demonstrate their entitlement to the protection of the public duty doctrine. In order for the Municipal Defendants to succeed with their 12(b)(6) Motion, the Municipal Defendants must "demonstrate to a certainty that [their] relationship with the Plaintiff does not come within an exception to the public duty doctrine." Haley v. Town of Lincoln, 611 A.2d 845, 849 (R.I. 1992). No burden is presently on Plaintiffs.

The Rhode Island Supreme Court has specifically stated that it is "virtually impossible" for a municipality to obtain judgment on the pleadings in cases involving the public duty doctrine.

> It is virtually impossible for the State to sustain such a burden when the pleadings are viewed in a manner most favorable to the plaintiff. Consistent with Rule 8's pleading requirements, the plaintiff is not obligated to provide in the complaint details concerning the state's awareness of or reaction to the circumstances surrounding his or her claim. Such information is, in any event, frequently unavailable to a plaintiff at the pleading stage. Any gaps in the pleadings regarding the state's conduct as it bears upon the plaintiff's actions are to be read in the plaintiff's favor. In light of the fact-intensive exceptions to the public duty doctrine, the trial court is unlikely to be able to hold that the plaintiff could not establish the state's negligence under any set of facts that might be adduced a trial. Accordingly, we conclude that controversies in which the public duty doctrine are asserted as a defense will rarely be appropriate for disposition by means of a Rule 12(c) motion for judgment on the pleadings.

611 A.2d 845 at 849-50. (emphasis added) (expressly applying this holding to motions to dismiss for failure to state a claim under Rule 12(b)(6)).[2] Plaintiffs have not had the benefit of the discovery process to more fully develop the facts and

[2] In St. James Condo Ass'n. v. Lokey, 676 A.2d 1343, 1344 (R.I. 1996), the Rhode Island Supreme Court reversed the 12(b)(6) dismissal of plaintiffs' actions which alleged that a town building inspector had negligently inspected or failed to inspect the plans and construction of the project and had negligently issued occupancy permits for units in the development.

circumstances surrounding the Municipal Defendants' acts and omissions. In accordance with Haley, therefore, the Municipal Defendants' 12(b)(6) motion should be denied.

The Rhode Island Supreme Court recognized in Quality Court Condominium Ass'n v. Quality Hill Development Corp., 641 A.2d 746 (R.I. 1994), that a special duty can arise where an inspector has repeated contacts with a given property such that its owners and users are reasonably ascertainable to him. Similarly, in Boland v. Town of Tiverton, 670 A.2d 1245 (R.I. 1996), a question of fact arose as to whether a special duty was owed where town inspectors had prior contacts with a building's owners. The facts regarding the Municipal Defendants' knowledge as to particular Plaintiffs is totally undeveloped at this time.[3]

Further, the public duty doctrine will not protect the Municipal Defendants when their agent was performing an act which is one in which private persons also ordinarily engage. Yankee v. LeBlanc, 819 A.2d 1277, 1280 (R.I. 2003). It is alleged that The Station was also inspected by private individuals acting on behalf of insurance companies prior to February 20, 2003. The activities of the Municipal Defendants and the private inspectors may have been identical or nearly so.

It is also important to note that the negligence of Bettencourt may give rise not only to liability under Yankee, supra, but possibly to unlimited liability on the part of the Town of West Warwick. We do not yet know the facts surrounding his hiring and activities on the night in question. We do not yet know who selected him, what exactly were his duties, how he was paid, and whether the Town made a profit on the payments from Derco. It may be that the Town of West Warwick was

[3] Even if, arguendo, the actions of the Municipal Defendants were not egregious, it may well be that, at least as to some of the victims, a special duty was owed.

acting in a proprietary capacity, similar to a professional security service. Proprietary functions result in unlimited liability when performed negligently.

Plaintiffs do not rely on the Fire Code as creating a cause of action in their favor. Municipalities will be held liable for the negligent performance of a building inspection if the conduct of the local official is egregious.[4] Rhode Island law also recognizes a duty to act carefully after the assumption of an activity such as the inspection of a building or the undertaking to supervise and train deputy state fire marshals and assistant deputy state fire marshals even if there is no duty to Plaintiffs initially to undertake the activity. Quality Court Condominium Ass'n v. Quality Hill Development Corp., 641 A.2d 746 (R.I. 1994). This is the specific duty which Plaintiffs allege that the Municipal Defendants breached. The duty to act carefully after affirmative conduct is distinguishable from cases in which no attempt to enforce municipal regulations has occurred. Rhode Island case law evidences a public policy favoring municipal liability for negligently performed building inspections and the Rhode Island Supreme Court has imposed liability on municipalities for negligent building inspections.

The negligent performance of a building inspection has been held to be actionable in Rhode Island. For example, in Quality Court Condominium Ass'n v. Quality Hill Development Corp., 641 A.2d 746 (R.I. 1994), plaintiffs alleged that a local building inspector failed to properly inspect condominiums and approved construction work which violated the building code. Id. at 747-748. The city argued that it could not be held liable for defective construction because its

[4]Or if a special duty is owed and, possibly, if the inspection is of the type performed by private parties.

"permits and the inspections are not insurance policies wherein the municipality guarantees that each building is in compliance with the code." 641 A.2d at 750. However, the Rhode Island Supreme Court disagreed and ruled that the city would be liable if plaintiffs were able to prove: (1) that a special duty was owed to the plaintiffs, or (2) that the city's conduct was egregious. 641 A.2d at 750.[5]

Two years later, the Rhode Island Supreme Court again ruled that a building inspector could be held liable for the negligent performance of his duties. In Boland v. Tiverton, 670 A.2d 1245 (R.I. 1996), the town building inspector issued a certificate of occupancy despite the fact that the house construction was incomplete and building code violations existed when he inspected the premises. Id. at 1246. Subsequently, plaintiffs filed suit against the Town of Tiverton alleging "negligent performance of the building inspections by the Town's building inspector." 670 A.2d at 1247. The Rhode Island Supreme Court vacated the order which granted summary judgment to the Town of Tiverton holding, "[T]his court notes that the record before us contains sufficient facts that, if more fully developed at trial, as in Quality Court, could probably support a finding of either a special duty owed to the Bolands or egregious conduct by the Town." 670 A.2d at 1249. The court explained that an action can be founded upon a building inspector's negligence:

> We understand that, when making her decision in this case, the trial justice did not have available to her the benefit of Quality Court, supra, and its discussion of the relationship between the enforcement of the building code and the liability of municipalities for the negligence of its building inspectors.

[5] The Rhode Island Supreme Court found it unnecessary to analyze the facts of this case under the egregious conduct exception to the public duty doctrine because it first found that a special duty existed. Quality Court Condominium Ass'n., 641 A.2d at 751.

670 A.2d at 1249. (emphasis added). More recently, the Rhode Island Supreme Court has continued to analyze negligent building inspection cases under the special duty and egregious conduct exceptions to the public duty doctrine. For instance, in Haworth v. Lannon, 813 A.2d 62 (R.I. 2003), a plaintiffs' allegations were analyzed under the egregious conduct exception:

> . . . plaintiffs have not presented any evidence that the Town, before its issuance of the certificate of occupancy, was so negligent that its inspection amounted to egregious conduct or created a situation of extreme peril that it then disregarded.

813 A.2d at 65-66. (emphasis added). Similarly, in Torres v. Damicis, 853 A.2d 1233 (R.I. 2004), the Rhode Island Supreme Court ruled that a plaintiff's claims against a town building inspector could go forward if he could "prove that his circumstances qualify under one of the exceptions to the public duty doctrine." Id. at 1239.[6] Clearly, Haworth and Torres would not have reached the issue of whether the municipality acted in an egregious manner if an actionable duty did not exist. The distinction between a statutory duty to take action and the common law duty to exercise care after the voluntary assumption of a duty was succinctly stated by the Alaska Supreme Court in a hotel fire case:

> We do not reach the issue of whether the State had a statutory duty to take action concerning hazards discovered at the Gold Rush, because we find that the State assumed a common law duty by its affirmative conduct. It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully . . .

[6] In both Haworth and Torres, the plaintiffs appealed from grants of summary judgment where no issue of material fact existed as to whether the special duty or egregious conduct exceptions to the public duty doctrine applied. Haworth, 813 A.2d at 63; Torres, 853 A.2d at 1253. Importantly, both cases had the benefit of discovery, unlike the case at bar.

Adams v. State, 555 P.2d 235, 240 (1976). (emphasis added). Rhode Island law follows this "ancient learning." (See, Izen v. Winoker, 589 A.2d 824 (R.I. 1991)).

As discussed above, the doctrine of sovereign immunity, the public duty doctrine and its exceptions vary from state to state. The law of Kentucky or Vermont is not relevant as to whether or not there can be governmental liability for negligent inspection activity. Each state has developed its own (often confusing) governmental tort liability scheme.

For instance, in Commonwealth of Kentucky v. Brown, 605 S.W.2d 497 (Ky. 1980), the Kentucky Supreme Court distinguished the Kentucky Tort Claims Act from the Federal Tort Claims Act and the Florida Tort Claims Act (both similar to Rhode Island's Tort Claims Act) by stating, "Both of these statutes, by express terms, provide that the government is to be treated as if it were a private individual. Our statute mandates no such treatment of the Commonwealth." Id. at 498. Of course, both the Federal Tort Claims Act and the Rhode Island Tort Claims Act indicate that the government shall be liable in the same manner as a private individual. 28 U.S.C. § 2674, R.I. Gen. Laws § 9-31-1. The case of Corbin v. Buchanan, 163 Vt. 141, 657 A.2d 170 (1995), is also distinguishable in that the Supreme Court of Vermont upheld a town's ordinance which expressly prohibited a private cause of action against the town.[7]

The Municipal Defendants argue that Plaintiffs' tort actions are not expressly created within the R.I. Fire Safety Code. Plaintiffs do not rely on that statute as creating their rights. The Municipal Defendants had a common law duty to exercise

[7] FAMC pp. 94-95.

reasonable care after undertaking the specific inspections which occurred at The Station. This duty was recognized in Quality Court Condominium Ass'n., Boland, Haworth, and Torres. Plaintiffs do not allege that their cause of action arises directly from the Fire Safety Code but, rather, that the Code serves as evidence of the proper standard of care to be followed if an inspection is undertaken.

In addition, Plaintiffs rely upon R.I. Gen. Laws § 9-1-2 as a basis for their cause of action. This argument is set forth in detail in section IV F, below.

B. Quasi-Judicial Immunity Is Not Applicable To This Case

In Suitor v. Nugent, 98 R.I. 56, 199 A.2d 722 (1964), the Rhode Island Supreme Court afforded quasi-judicial immunity to the Attorney General where he exercised prosecutorial discretion. Id. at 58, 723. The court ruled, "It is clear . . . that the Attorney General, in acting to enforce the criminal law, performs acts which require an exercise of judgment or discretion and are in the nature of judicial acts and that, when so acting, he acts as a quasi-judicial officer." 98 R.I. at 61, 199 A.2d at 724.

Following its decision in Suitor, the Rhode Island Supreme Court extended quasi-judicial immunity to the Department of Environmental Management in Mall at Coventry Joint Venture v. McLeod, 721 A.2d 865 (R.I. 1998), and to the Rhode Island Disability Determination Service in Psilopoulos v State of Rhode Island, 636 A.2d 727 (R.I. 1994).

Larocque, Bettencourt and building inspector Stephen D. Murray's actions and the functions of their agencies in this context are clearly distinguishable from the actions and agency functions involved in Psilopoulos and Mall at Coventry Joint Venture. Neither made disability determinations decisions based on (medical)

recommendations of others. Neither had the kind of discretion discussed in Mall at Coventry Joint Venture where DEM, an administrative agency, concluded that a proposal represented a significant alteration of fresh water wetlands and, therefore, requested a formal application from plaintiffs. In fact, in Mall at Coventry Joint Venture the plaintiff failed to exhaust its administrative remedies, unlike the case at bar.

The acts performed by Larocque, Bettencourt and Murray,[8] by contrast, were ministerial in nature and as a result they are not entitled to quasi-judicial immunity. Moreover, the enforcement or administration of a mandatory duty at the operational level will be deemed to be ministerial even if professional expert evaluation is required:

> Generally speaking, a duty is discretionary if it involves judgment, planning or policy decisions. It is not discretionary [i.e., ministerial] if it involves enforcement or administration of a mandatory duty at the *operational level*, even if professional expert evaluation is required.

Beatty v. Washington Metropolitan Area Transit Authority, 860 F.2d 1117, 1127, 274 U.S. App. D.C. 25, 35 (1988) (emphasis added by Court) (citation omitted). Finally, in Coffey v. City of Milwaukee, 74 Wis.2d 526, 535, 247 N.W.2d 132, 136-137, the Supreme Court of Wisconsin ruled that the act of inspection does not involve a quasi-judicial function because "violations either exist or do not exist according to the dictates of the regulations governing the inspection, and not according to the discretion of the inspector."

The R.I. Fire Safety Code § 1-4.1 specifically states that "[t]he State Fire Marshal is the sole authority having jurisdiction for the strict enforcement of the

[8] Murray is alleged to be the Building Inspector of West Warwick and to have been guilty of egregious negligence. FAMC ¶423.

provisions of this Code. The State Fire Marshal shall have authority to appoint and certify as many deputy state fire marshals and assistant deputy state fire marshals as are deemed necessary to strictly enforce the provisions of this Code." (emphasis added). Importantly, § 1-4.1 goes on to indicate that discretion lies only with the Fire Safety Code Board of Appeal and Review:

> . . . the Fire Safety Code Board of Appeal and Review is the sold authority having jurisdiction to grant variances, waivers, modifications and amendments from or to review and accept any proposed fire safety equivalencies and alternatives to, the strict adherence to the provisions of this Code . . .

R.I. Fire Safety Code, § 1-4.1. (emphasis added).

In many respects, the R.I. Fire Safety Code is so precise that no discretion exists in identifying violations. A very few examples follow:

> R.I. Gen. Laws § 23-28.6-3. Maximum occupancy. - The occupant load . . . shall be determined by dividing the net floor area or space by the square feet per occupant . . .
>
> R.I. Gen. Laws § 23-28.6-4. Standing conditions. – (a) Standing patrons may be allowed in places of assembly at the rate of one person for each five square feet (5 sq. ft.) of area available for standing . . .
>
> R.I. Gen. Laws § 23-28.6-7. Egress passageways. – (a) The distance of travel from any point within the place of assembly to an approved egress opening therefrom shall not exceed one hundred fifty feet (150') in non-sprinklered buildings . . . (c) All new doorways and connecting passageways to the outside, to be considered as means of egress, shall be at least thirty-six inches (36") in width and at least seventy-eight inches (78") in height, . . . All existing doorways and connecting passageways to the outside to be considered as means of egress, shall be at least thirty-two inches (32") in width and at least seventy-four inches (74") in height.

See especially – because of its applicability to the foam whose presence looms so large in these cases:

R.I. Gen. Laws § 23-28.6-15. (3) Match Flame Test.

> (i) Samples, in dry condition, are to be selected for tests and are to be a minimum of one and one-half inches (1 ½") wide and four inches (4") long. The fire exposure shall be the flame from a common wood kitchen match (approximate length 2 7/16 inches; approximate weight twenty-nine (29) grams per hundred), applied for twelve (12) seconds.
>
> (ii) The test shall be performed in a draft-free and safe location. The sample shall be suspended (preferably held with a spring clip, tongs, or some similar device) with the long axis vertical, with the flame applied to the center of the bottom edge, and the bottom edge one-half inch (1/2") above the bottom of the flame. After twelve (12) seconds of exposure, the match is to be removed gently away from the sample.

R.I. Fire Safety Code § 1-4.4. Sections 1-4.5 and 1-4.14 provide the Rhode Island Fire Safety Code Board of Appeal and Review's Chairman of the Board (not any municipal employees) with final authority to exercise judgment to summarily abate conditions which are in violation of the R.I. Fire Safety Code or to order the immediate evacuation of premises deemed unsafe because of R.I. Fire Safety Code violations.

The distinction between prosecutors entitled to quasi-judicial immunity and a county building inspector who was not entitled to quasi-judicial immunity was explained in Andrews v. Ring, 266 Va. 311, 585 S.E.2d 780 (2003). In Andrews, a building inspector, upon the advice of a prosecutor, filed a criminal complaint against three individuals alleging violations of the building code. Subsequently, actions were filed by the three individuals against the prosecutor and the building official. First, the court held that the prosecutor was entitled to quasi-judicial immunity:

> In each case where a prosecutor is involved in the charging process, under Virginia law, that action is intimately connected with the prosecutor's role in judicial proceedings and the prosecutor is entitled to absolute immunity from suit . . .

266 Va. at 321, 585 S.E.2d at 785. In sharp contrast, the same court in the same matter held that the building official was not entitled to quasi-judicial immunity:

> We conclude that Ring's duties as a building inspector are more akin to those of a police officer in the enforcement of laws, rules and regulations, than a prosecutor in the judicial process. As a matter of law, Ring is not entitled to the absolute immunity afforded by quasi-judicial immunity.

266 Va. at 325, 585 S.E.2d at 788. (emphasis added).

In Bolden v. City of Covington, 803 S.W.2d at 577, 579 (Ky. 1991), relied upon by the Municipal Defendants, a City Director of Housing Development was cloaked with quasi-judicial immunity. In defining the term "quasi-judicial," the court turned to Black's Law Dictionary which states:

> A term applied to the action, discretion, etc. of public administrative officers or bodies, who are required to investigate facts, or ascertain the existence of facts, hold hearings, weigh evidence, and draw conclusions from them, as a basis for their official action, and exercise discretion of a judicial nature.

Id. at 581. (citations omitted) (emphasis added). The authority of the City Director of Housing Development in Bolden is distinguishable from Larocque's authority and more akin to the authority vested in the Rhode Island's Fire Safety Code Board of Appeal and Review's Chairman of the Board (R.I. Gen. Laws § 23-28.3-2).

The distinction between quasi-judicial acts (which are entitled to absolute immunity) and investigatory acts (which are not) is further demonstrated by cases where prosecutors were not afforded absolute immunity. One example is the United States Supreme Court case of Buckley v. Fitzsimmons, 509 U.S. 259, 113

S.Ct. 2606 (1993), which held that a prosecutor was not entitled to absolute immunity when performing investigative functions:

> When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.

Id. at 273, 2616. (internal citations and quotes omitted).

Thus, even a prosecutor may not be entitled to absolute quasi-judicial immunity when he or she performs acts which are investigative or ministerial in nature. None of the municipal employees in this case holds hearings, weighs evidence, draws conclusions from the evidence in hearings, or exercises discretion of a judicial nature. Their acts were not quasi-judicial but were ministerial in nature because they were under a statutory duty to "strictly enforce" the quantifiable provisions of the R.I. Fire Safety Code. Therefore, the Municipal Defendants are not entitled to a blanket quasi-judicial immunity as to each and every function they perform.

It is clear from Buckley, supra, that prosecutors' absolute immunity or lack thereof will turn on the specific activity in question. 509 U.S. 273, 113 S.Ct. 2616. In the case at bar this, at a minimum, is presently a fact-intensive question which cannot presently be decided in favor of the Defendants before discovery.

It should also be noted that building inspectors and fire marshals perform very similar functions. As explained, supra, several cases in Rhode Island have held that municipalities will be liable for the egregious negligence of local building inspectors (or violation of a special duty).[9] Implicit in those cases is that the

[9] As noted above, Plaintiffs have alleged that the West Warwick Building Inspector was negligent in this case.

activities of building inspectors are not entitled to quasi-judicial immunity; therefore, Larocque and Murray do not enjoy this protection. Although Mall at Coventry Joint Venture was decided on different grounds by a superior court justice, the Rhode Island Supreme Court did not hesitate to rely on quasi-judicial immunity, sua sponte, to deny liability. As stated by that court, "We often have stated that this court may affirm a justice of the superior court on grounds other than those which he or she has utilized in determining the outcome of the case." Mall at Coventry Joint Venture, 721 A.2d at 869. Because this doctrine was not raised once by the Rhode Island Supreme Court in the cases of Quality Court Condominium Ass'n., Boland, Haworth, or Torres, supra, that court has implicitly held that local building inspectors are not entitled to quasi judicial immunity.

C. It Is Premature To Hold That Larocque Is Protected By The Immunity Provisions of R.I. Gen. Laws § 23-28.2-17.

R.I. Gen. Laws § 23-28.2-17, relied upon by the Municipal Defendants for immunity, is not without preconditions. It provides, in pertinent part,

> . . . [A]ny fire marshal, acting in good faith **and** without malice, shall be free from liability for acts performed under any of its provisions or by reason of any act or omission in the performance of his or her official duties in connection therewith.

(emphasis added). The FAMC alleges that Larocque was egregiously negligent and that "his actions constituted a lack of good faith performance of his duties." FAMC p. 95, ¶421.

Black's Law Dictionary, quoted with approval in State of Rhode Island v. DiPrete, 1997 WL 839899, 12 (R.I. Super.), in defining good faith states that it "generally speaking, means being faithful to one's duty or obligation." Black's Law Dictionary, 744 (6th ed. 1991). The issue of "good faith" as it applies to R.I. Gen.

Laws § 23-28.2-20 was ruled upon by the Rhode Island Supreme Court in Vaill v. Franklin, 722 A.2d 793 (R.I. 1999). In Vaill, the Rhode Island Supreme Court reversed the Superior Court and ruled that "whether Franklin (a fire chief who performed an inspection at a business) is shielded from liability based upon qualified immunity based upon 'good faith' is dependent on whether the inspection itself was reasonable under the circumstances in this case." 722 A.2d at 795. (emphasis added). Next, that Court ruled that summary judgment was improper because questions of material fact remained:

> However, questions of material fact remain as to whether consent had been given and the search was reasonable, or whether an emergency situation existed which necessitated a warrantless inspection.

722 A.2d at 796. (emphasis added). Of course, the parties in Vaill had the benefit of discovery, unlike the Plaintiffs in the case at bar. Serious questions of fact remain.

The State has claimed that the statutory immunity that may be applicable to the individuals also shields the State. The Town of West Warwick has not made such an argument. It would be unavailing if made. (See Plaintiffs' Memorandum in Opposition to State Defendants' Motion to Dismiss which discusses the limited range of protection of such immunities.)

D. The Public Duty Doctrine Does Not Protect The Municipal Defendants In This Case

This issue is discussed at length in Section IV A, above.

E. Defendants' Liability Is Not Cut Off By Illegal And/Or Negligent Acts Of Others

The negligent conduct of the Municipal Defendants was at least a concurring proximate cause of Plaintiffs' injuries and it is not insulated by any intervening acts

of others. While the Municipal Defendants argue that their actions were not "the proximate cause" of the injuries sustained by Plaintiffs, and that the illegal actions of other defendants supercede any negligence on their part, all such questions of illegality and causation remain questions of fact in this case. Moreover, the Municipal Defendants' reliance upon Rhode Island case law completely ignores cases upholding concurrent proximate causes of injuries.

Plaintiffs' FAMC clearly alleges that the Municipal Defendants' negligence was the proximate cause of Plaintiffs' injuries. While counts directed at other defendants make similar allegations, this inconsistent/ alternative pleading is clearly permissible. As stated by the First Circuit Court of Appeals:

> This argument fails adequately to take into account a procedural provision, in Federal Rule of Civil Procedure 8(e)(2), that allows parties to take inconsistent positions in their pleadings. Especially at the early stages of litigation, a party's pleading will not be treated as an admission precluding another, inconsistent, pleading.

Rodriquez-Suris, et al. v. Montesinos, et al., 123 F.3d 10, 21 (1st Cir. 1997). These other counts are not admissions that the acts of others superceded the Municipal Defendants' negligence (or even, in fact, occurred), especially where those allegations have not been incorporated by reference (or otherwise) in the counts directed against the Municipal Defendants.

In any event, it was reasonably foreseeable that fire safety code violations and overcrowding would result in harm. As is true with the issue of legal duty, a key determinant on the issue of superseding causation is foreseeability; that is, was it or should it have been reasonably foreseeable to the Municipal Defendants that

their alleged negligent conduct could be expected to lead to harm?[10] This court has noted that the determination of proximate causation and the existence of any superseding cause is a question of fact. Spendorio v. Bilray Demolition Co., Inc., 682 A.2d 461, 467 (R.I. 1996). Proximate cause is proven by showing that "but for the negligence of the tortfeasor, injury to the plaintiff would not have occurred." Martinelli v. Hopkins, 787 A.2d 1158, 1169 (R.I. 2001). If two individuals' acts cause one injury, both individuals are liable:

> It should be noted that the plaintiff was not required to prove that the town's negligence was *the* proximate cause of his injuries and damages, but only that it was *a* proximate cause which, standing alone, or in combination with any other defendant's negligence, contributed to the plaintiff's injuries.

Martinelli, 787 A.2d at 1170. (emphasis original). In Denisewich v. Pappas, 97 R.I. 432, 436, 198 A.2d 144, 147-148 (1964), the Rhode Island Supreme Court explained that "an intervening act will not insulate a defendant from liability if his negligence was a concurring proximate cause which had not been rendered remote by reason of the secondary cause." Explained a different way in Roberts v. Kettelle, 116 R.I. 283, 294-295, 356 A.2d 207, 215 (1976), "[F]or negligent conduct to be considered a past condition . . . such negligent conduct must have been totally inoperative as a cause of the injury."

One very instructive judicial effort to define foreseeability is found in Bigbee v. Pacific Telephone and Telegraph Company, 192 Cal.Rptr. 857, 665 P.2d 947 (1983), which held:

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[10] If the independent or intervening cause is reasonably foreseeable, the causal connection remains unbroken. S.M.S. Sales Co., Inc. v. New England Motor Freight, Inc., 115 R.I. 43, 47, 340 A.2d 125, 127 (1975); citing, Aldcroft v. Fidelity & Gas Co., 106 R.I. 311, 259 A.2d 408 (1969); Denisewich v. Pappas, 97 R.I. 432, 198 A.2d 144 (1964).

> It is well to remember that foreseeability is not to be measured by which is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct.

Id. at 862, 57 and 952, (citing 2 Harper & James, Law of Torts, (1956) § 18.2, at p. 1020). One may be held accountable for creating even "the risk of a slight possibility of injury if a reasonably prudent [person] would not do so." Id. (citing Ewart v. Southern Cal. Gas Co., 237 Cal.App.2d 163, 172, 46 Cal.Rptr. 631 (1965); quoting Vasquez v. Alameda, 49 Cal.2d 674, 684, 321 P.2d 1 (dis. opn. of Traynor, J.)). Finally, the court went on to say that "what is required to be foreseeable is the general character of the event or harm . . . not its precise nature or manner of occurrence." Id. See also Hueston v. Narragansett Tennis Club, Inc., 502 A.2d 827 (R.I. 1986).

The failure to identify and/or order the remediation of violations of the R.I. Fire Safety Code were substantial causes of the injuries and deaths that resulted on February 20, 2003. The risk of fire in a nightclub, and elsewhere, can come in many forms, only one of which includes the use of a pyrotechnic display by a rock-and-roll band. In no way was the harm here of a kind and degree so far beyond the risk foreseeable to the Municipal Defendants that it would be unfair to hold them responsible. In fact, the opposite is true. The inspections they performed are important because of the very foreseeability of untoward events.

The Municipal Defendants rely upon Travelers Insurance Co. v. Priority Business Forms, Inc., 11 F.Supp.2d 194 (D.R.I. 1998), which ruled "the commission of arson by a third party is not the natural and probable result of discontinuing a burglar alarm system and failing to notify the landlord thereof." Id. at 200.

(emphasis original). The facts of Plaintiffs' actions are, however, readily distinguishable from the facts of Travelers Insurance Co. First, there is no allegation that someone intentionally ignited The Station, unlike the intentional act of arson in Travelers Insurance Co. Second, unlike Travelers Insurance Co., where the court emphasized the fact that a disconnected burglar alarm system had not been intended to guard against fire at the premises, it is clear that the R.I. Fire Safety Code was enacted to "safeguard life and property from the hazards of fire and explosives." R.I. Fire Safety Code § 1. The particular source of the fire has no bearing on Plaintiffs' action because, regardless of the ignition source, the Municipal Defendants' actions/inactions had not become "totally inoperative" by the time of the fire, as required by Hueston. These Defendants' failure to remediate was still operative, (or so the trier of fact would be warranted in finding) at the time of the fire.

Even in situations where an intentional criminal act occurs, liability may still attach to other defendants. For instance, in Welch Manufacturing, Division of Textron, Inc. v. Pinkerton's, Inc., 474 A.2d 436 (R.I. 1984), the defendant security service corporation hired a security guard who took part in thefts of the plaintiff's property while he was on duty at the plaintiff's premises. Id. at 438. The Rhode Island Supreme Court ruled that the criminal acts were reasonably foreseeable:

> We are of the opinion that Lawson's succumbing to temptation and his participation in the criminal thefts might be found by a rational trier of fact to be a reasonably foreseeable result of Pinkerton's negligence in taking reasonable steps to assure its employee's honesty, trustworthiness, and reliability.

474 A.2d at 444. The court went on to rule that the foreseeability of the criminal act was a jury question. 474 A.2d 444. In addition, in Gercey v. U.S., 409 F.Supp.

946, 954 (D.R.I. 1976), this Court ruled that an intentional or criminal act may merely be a concurrent cause if the act is one which the "defendant might reasonably anticipate and against which it would be required to take precautions."

F. There May Be Liability Under R.I. Gen. Laws § 9-1-2

The Municipal Defendants' argument is succinct. They argue that Larocque's actions do not "as a matter of law" amount to a criminal act under Rhode Island Law.[11] This remains to be seen.

Plaintiffs have alleged that "Several of Defendant Larocque's actions or omissions constitute the commission of a crime or offense" giving rise to a separate statutory right of recovery for all injuries pursuant to R.I. Gen. Laws § 9-1-2 which provides:

> Whenever any person shall suffer any injury to his or her person, reputation, or estate by reason of the commission of any crime or offense, he or she may recover his or her damages for the injury in a civil action against the offender, and it shall not be any defense to such action that no criminal complaint for the crime or offense has been made. . . .

It is, very simply, Plaintiffs' position that apart from the existence, vel non, of tort liability apart from this statute, the statute creates such liability if its requirements are satisfied. If a crime (or offense) results in injury, liability follows without more.

Plaintiffs have alleged that the Municipal Defendants (and Owens) are guilty of egregious negligence. In Rhode Island, manslaughter is a common law crime, State v. Pina, 524 A.2d 1104 (R.I. 1987), the punishment for which is statutory.

[11] Thus, they implicitly acknowledge liability under this theory if Larocque's acts constitute a crime or offense.

(R.I. Gen. Laws § 11-23-3). Involuntary manslaughter has thus been defined in this state:

> This court has long held that the crime of involuntary manslaughter may be based upon proof that a defendant has been guilty of gross negligence and that such gross negligence is equated with the term "criminal negligence."

State v. Cacchiotti, 568 A.2d 1026, 1030 (R.I. 1990). See also State v. Robbio, 526 A.2d 509 (R.I. 1987).

Ironically, the State has indicted the Derderians under a perfectly analogous theory. As to each victim, two counts are charged. The State has alleged that they did:

> a) perform a legal act with criminal negligence, on days and dates between the 1st day of March, 2000 through and including the 20th day of February, 2003 at West Warwick in the County of Kent, which on February 20, 2003 unintentionally and prematurely caused the death of . . . in violation of § 11-23-3.

This, of course, is the common law crime of manslaughter discussed in Cacchiotti and Robbio, supra. The indictment continues,

> b) perform an unlawful act not amounting to a felony, to wit the violation of § 23-28.6-15 of the General Laws of Rhode Island, 1956, as amended (Reenactment of 2002) which unintentionally and proximately caused the death of . . . in violation of § 11-23-3.

This second count is, of course, based on violation of the Fire Safety Code. Plaintiffs have alleged such a violation by the Municipal Defendants, viz, those provisions dictating strict enforcement by inspectors.

It is unknown at this time, what efforts, if any, were made by the State to investigate the possibility of indicting the inspectors. That no such indictment has yet been forthcoming (and may never be) is irrelevant under R.I. Gen. Laws

§ 9-1-2. Furthermore, there is at least one other common law crime that is applicable to Plaintiffs' case.

R.I. Gen. Laws § 11-1-1 provides that "every act and omission which is an offense at common law, and for which no punishment is prescribed by the General Laws, may be prosecuted and punished as an offense at common law . . ."[12] In State v. LaPlume, 118 R.I. 670, 375 A.2d 938 (1977), the Rhode Island Supreme Court held that "[s]ince this section [11-1-1] makes every act which is an offense at common law punishable in Rhode Island, the legislature intended to preserve and not impair or abrogate the common law." Id. at 678, 942. The negligent failure of an officer to perform a ministerial duty imposed upon him by law is a common law misdemeanor. State v. Winne, 21 N.J.Super. 180, 203, 91 A.2d 65, 76 ("[I]t is a general rule of the common law that willful neglect or failure or a public officer to perform any ministerial duty which by law he is required to perform is an indictable offense."); LaTour v. Stone, 139 Fla. 681, 692, 190 So. 704, 709 (1939) ("At common law a failure or neglect of an officer to perform a ministerial duty imposed upon him by law renders him guilty of a misdemeanor; and it would seem that, notwithstanding the provisions of a statute which have been disobeyed are, as respects the public, merely directory, the neglect of the officer to observe them may be a misdemeanor.") (quotation omitted).

In Larmore v. State, 180 Md. 347, 348, 350, 24 A.2d 284, 285, 286 (1942), a conviction of criminal misfeasance was upheld where county commissioners negligently approved and passed for payment fictitious and fraudulent claims.

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[12] Punishment is provided in such instance by R.I. Gen. Laws § 11-1-1.

V. Conclusion

The Municipal Defendants' Motion to Dismiss should be denied. It is clear that there are factual issues that require exploration through discovery.

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